

**United States Department of Labor
Employees' Compensation Appeals Board**

PATRICIA A. MORRIS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Capitol Heights, MD, Employer**

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**Docket No. 04-109
Issued: October 25, 2004**

Appearances:

*Ronald G. Ray, Sr., Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 20, 2003 appellant's representative filed a timely appeal from the Office of Workers' Compensation Programs dated August 27, 2003 which rejected her claim for aggravation of a preexisting low back condition commencing May 15 or August 17, 1992, causally related to her work duties performed during the period April 12 through August 17, 1992. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability due to a preexisting low back condition commencing May 15 or August 17, 1992, causally related to the work duties performed during the period between April 12 and August 17, 1992.¹

¹ This is the same issue addressed by the Board in its August 27, 2001 decision, Docket No. 00-2063, wherein the Board found that the medical evidence needed to be further developed.

FACTUAL HISTORY

This is appellant's eighth appeal before the Board on this issue. The history of the case is as follows: Docket No. 96-363² resulted in the Board issuing an Order Dismissing Appeal effective February 13, 1996 at the appellant's request. Docket No. 97-907³ affirmed the Office's decisions dated December 23, September 4 and May 20, 1995 on June 3, 1998 finding that appellant had not established that she sustained an aggravation of a preexisting low back condition causing disability commencing May 15 or August 17, 1992, causally related to her part-time light-duty work she performed between April 12 and August 17, 1992. In Docket No. 00-2063⁴ the Board set aside the Office decisions dated March 20, 2000 and May 21, 1999 and remanded the case for further development under *Carlone*⁵ on August 27, 2001. Docket No. 02-0010⁶ resulted in the Board issuing an order remanding case on March 21, 2003 for inclusion of a physician's clarification report. Docket No. 02-1798⁷ was a decision which on February 3, 2003 affirmed the Office's decisions dated February 25, 2002 and June 27, 2001 finding that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable work.⁸ Docket No. 02-1799⁹ resulted in the Board issuing an order remanding case effective January 10, 2003 for inclusion of the medical reports upon which the Office based its March 13, 2002 decision and for reconstruction of the record. Finally, Docket No. 03-0010,¹⁰ issued on January 27, 2003, resulted in the Board issuing an order to transmit the case record to the Board.

The facts and the circumstances of the case are presented in the previous Board decisions dated June 3, 1998 and August 27, 2001 and are hereby incorporated by reference.¹¹

On June 30, 1992 appellant filed two separate claims for recurrence of disability commencing on May 14 or August 17, 1992, causally related to her August 28, 1976 original injury. Appellant claimed that she was totally disabled due to low back pain. She originally

² Docket No. 96-363 (issued February 13, 1996) (the Office accepted that appellant was originally hit in the back by a cash drawer. Lumbar sprain was also accepted).

³ Docket No. 97-907 (issued June 3, 1998) (she claimed aggravation of a preexisting low back condition).

⁴ Docket No. 00-2063 (issued August 27, 2001).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ Docket No. 02-10 (issued March 21, 2003).

⁷ Docket No. 02-1798 (issued August 27, 2001).

⁸ This decision does not appear in appellant's present case record.

⁹ Docket No. 02-1799 (issued January 10, 2003).

¹⁰ Docket No. 03-10 (issued January 27, 2003).

¹¹ Docket Nos. 97-907 and 00-2063 respectively. Appellant had her claim accepted for exacerbation of chronic lumbar strain on August 28, 1976. She had her claim accepted for lumbar strain and chronic lumbar disc syndrome by aggravation on April 6, 1984 and she had her claim accepted for lumbosacral strain on July 28, 1987.

alleged that she remained totally disabled causally related to her 1992 recurrence of disability condition. In the Board's August 27, 2001 decision, it found that the medical evidence of record tended to support that in the summer of 1992 appellant experienced an aggravation of her preexisting low back condition, causally related to her light-duty job requirements. The Board also found, however, that none of appellant's treating physicians' provided reports containing medical rationale sufficient to discharge her burden of proof to establish her claim.¹² The Board ordered that the case be remanded for further development including the referral of appellant to an appropriate medical specialist for a rationalized opinion on whether appellant sustained an aggravation of an existing low back condition at some point between May 15 and August 17, 1992, causally related to her part-time, light-duty work performed between April 12 and August 17, 1992.

Accordingly, the Office scheduled appellant for a second opinion examination with Dr. A. Roy Rosenthal, a Board-certified orthopedic surgeon on November 7, 2001.

By report dated November 26, 2001, Dr. Rosenthal reviewed appellant's history of illness, her systems and functions, and the results of objective testing and he diagnosed chronic lumbosacral spine strain with underlying degenerative changes including facet arthropathy. He indicated that she had continuing complaints similar to those in April and August 1992. Dr. Rosenthal opined that there would not be any beneficial result from further treatment of appellant's chronic pain, as her condition was ongoing, and he recommended epidural blocks or facet injections. Dr. Rosenthal recommended that appellant undergo a discogram by an interventional radiologist and that she should try limited/light-duty work on a part-time basis.

The Office noted that Dr. Rosenthal failed to address the question posed to him regarding whether or not appellant sustained a 1992 aggravation of her preexisting low back condition. Therefore, the Office requested that he provide a clarifying supplemental report addressing these issues/questions.

In response Dr. Rosenthal again noted that appellant could attempt to return to limited/light-duty work on a part-time basis, but noted that he doubted that she would be capable of performing any gainful employment due to her underlying pain syndrome. Finding this comment to be unresponsive on the issue in question, the Office referred appellant to another second opinion specialist.

By letter dated January 28, 2002, the Office advised appellant that another second opinion examination had been scheduled with Dr. Louis E. Levitt, a Board-certified orthopedic surgeon, to address the questions raised by the Board. However, as appellant had already been seen by Dr. Levitt, and he felt that he could not see her again, arrangements were made for a second opinion examination by Dr. Marc B. Danziger, a Board-certified orthopedic surgeon, on February 25, 2002.

¹² Appellant's treating physician, Dr. Hampton J. Jackson, a Board-certified family practitioner, opined that appellant had had a disc injury for nine years, and therefore would probably not benefit from further intervention such as intradiscal electrothermal technique and he opined that she remained totally disabled for gainful employment.

By report dated February 25, 2002, Dr. Danziger noted that appellant presented with minimal objective findings on examination. He noted no spasm or other symptoms in the lower back, except for a slight amount of hamstring tightness, and found no neurological abnormalities anywhere in the lower extremities. Dr. Danziger opined that the diagnoses put forth by other physicians, that of chronic pain syndrome, and that excluding her from work, was unnecessary, in light of her significant symptom magnification and subjective symptomatology. He opined that appellant was outside the realm of normal healing from a simple lumbar strain, and that her history appeared suspect, especially with the numerous work-related back injuries she had experienced over a short period of time. Dr. Danziger noted that appellant's magnetic resonance imaging (MRI) scan findings from March 2000 which showed minimal evidence of disc disease, other than mild disc bulges, and a little central canal stenosis at L5-S1, but that no foraminal narrowing of either nerve root existed, and he further noted that her discogram studies from November 2001 was of minimal clinical significance.

Dr. Danziger also noted that her right hand was essentially normal with a well-healed scar on the right, and with no objective findings of carpal tunnel syndrome.

Based on the lack of objective symptomatology, Dr. Danziger determined that appellant did not continue to suffer from any significant medical condition, other than mild degenerative disc disease which he noted was present in the majority of the population in appellant's age group. He stated that he attributed any and all of her current symptomatology to the normal process of degenerative disc disease that occurred with aging, and opined that her present condition was completely unrelated to any 1992 work incident. Dr. Danziger opined that appellant could return to light duty at that time with restrictions on lifting over 10 pounds. He opined that there was no reason why appellant could not work a 40-hour work week at that time. Dr. Danziger also noted that the proposed intradiscal electrothermal technique (IDET) treatment was absolutely without merit and was unlikely to make any difference for appellant.

On March 5, 2002 the Office noted that Dr. Danziger did not address the question at issue, regarding appellant's recurrence of disability in 1992, and it requested a clarification.

In a response dated March 11, 2002, Dr. Danziger reviewed the statement of accepted facts and the record, and he opined that there was absolutely no evidence from appellant's job description that this position would have provided any additional aggravation or exacerbation of her preexisting low back condition. His medical rationale for this opinion was that working four hours a day is well less than he would expect to cause the aggravation, especially with her restriction of lifting no more than 10 pounds. Dr. Danziger further stated that he would anticipate no aggravation of a preexisting low back disease and stated that all of her symptomatology was completely related to her preexisting degenerative low back disease, rather than to anything from an exacerbation from light lifting or the four hours of work required between May 15 and August 17, 1992. He opined that appellant's minimal demands required by the limited-duty job between May and August 1992 should not have caused any aggravation or exacerbation of any preexisting low back disease. Dr. Danziger reemphasized that appellant's MRI scan was compatible with degenerative disc disease in a normal person in her age range, and that her electromyogram (EMG) was entirely normal. He reiterated that her physical examination was entirely normal and revealed almost no objective symptoms and nothing that

would have kept her out of work for this length of time. Dr. Danziger noted that there were no objective neurological findings or deficits and that she had significant symptom magnification. He further noted that appellant's 1992 lumbar strain symptomatology should have resolved after nine years and opined that appellant could perform eight hours per day light duty with minimal strain on the low back.

The Office reviewed Dr. Danziger's supplemental report and determined on March 13, 2002 that it constituted the weight of the medical evidence in this case. The Office determined that appellant had not met her burden of proof in establishing that she sustained an aggravation of a preexisting low back condition at some point between May 15 and August 17, 1992, causally related to her part-time limited-duty work performed between April 12 and August 17, 1992. The Office denied appellant's claim and emphasized that medical treatment at the Office's expense was not authorized.

On May 17 and June 3, 2002 appellant filed applications for review by the Board of the March 13, 2002 decision of the Office in file No. 250478459. The appeal was docketed as No. 02-1799. The Board remanded the case for reconstruction of the record as it lacked any of Dr. Rosenthal's reports, which were critical to an accurate adjudication.

Thereafter, in file No. 250098933, the Office rejected appellant's request for further review of her case on its merits on June 10, 2002, finding that the evidence submitted was immaterial and repetitious, and therefore not sufficient to warrant reopening appellant's claim for further review on its merits.

Appellant again requested an appeal before the Board on August 9, 2002 of the June 10, 2002 nonmerit decision. The appeal was docketed as No. 03-0010. Although appellant's claims had been combined, the Office continued to adjudicate them separately, and appellant separately appealed them to the Board.

On January 27, 2003 the Board issued an order docketed as No. 03-0010 instructing the Office to produce the complete case record for both of appellant's combined claims, and to issue an appropriate decision to protect appellant's appeal rights.

On February 3, 2003 the Board issued its decision in appellant's case regarding whether the Office properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c) on the grounds that she refused suitable work.¹³

The Office officially combined the records and issued a new final decision dated August 27, 2003. The Office found that appellant had failed to meet her burden of proof to establish that she sustained an aggravation of a preexisting low back condition at some point between May 12 and August 17, 1992, causally related to her part-time limited-duty employment between April 12 and August 17, 1992. The Office found that all of the medical reports from appellant's treating physicians lacked medical rationale for their conclusions and were insufficient to establish her claim. It found that Dr. Rosenthal's reports were unresponsive to the

¹³ As noted above, this February 3, 2003 Board decision does not appear in the present case record.

Office's questions and were not clarified as requested, such that they were of diminished probative value on the issue in question. The Office reiterated that Dr. Danziger's reports constituted the weight of the medical evidence and established that no such aggravation had taken place. The Office made no further findings with respect to appellant's termination of compensation under 5 U.S.C. § 8106(c).

By decision dated August 27, 2003, the Office rejected appellant's recurrence claims finding that the weight of the medical evidence was insufficient to establish that she sustained an aggravation of her preexisting low back condition that caused disability commencing May 15 or August 17, 1992. The Office found that the opinions of Dr. Danziger constituted the weight of the medical evidence as his conclusions were based upon objective examination results and were well rationalized and unequivocal.

LEGAL PRECEDENT

As used in the Federal Employees' Compensation Act,¹⁴ the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁵

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he cannot perform the light duty.¹⁶ As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.¹⁷

ANALYSIS

Appellant had returned to work in 1992 from her previous low back strain injuries, and had been working at the employing establishment part time, four hours per day, limited duty with lifting restrictions for the period April through August 1992, without documented difficulty. She ceased work on August 17, 1992, without any concurrent explanation as to why. Appellant did not submit contemporaneous factual or medical evidence sufficient to establish either a change in the nature and extent of her injury-related conditions or a change in the nature and extent of her light-duty job requirements.¹⁸

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to disability compensation.

¹⁶ *Terry R. Hedman*, 38 ECA 222,227 (1986).

¹⁷ *Id.*

¹⁸ See previous Board decisions Nos. 00-2063 and 97-907.

Appellant provided noncontemporaneous physicians' reports written approximately nine years after the alleged recurrence of disability which supported that she could try to return to work to limited duty on a part-time basis. Dr. Rosenthal noted that, in 2001, appellant continued to experience complaints similar to those which were manifested in April and August 1992. He diagnosed chronic lumbosacral spine strain with underlying degenerative changes including facet arthropathy, and opined that treatment would probably not have a beneficial result due to the long-standing nature of her low back pain condition. Dr. Rosenthal did not discuss causal relation with factors of her employment or with the previously accepted employment injury of low back chronic lumbar strain, which had been found to have previously resolved. Bridging symptoms were also not identified or discussed.

The 2001 radiologic study results revealed that there was a suspicion of a major underlying discopathic pain mechanism, but its work relatedness was not identified. Under fluoroscope examination appellant's discs seemed to be within normal limits with the exception of an L3-4 disc disruption with a prominent annular tear and L4-5, both of which were noted to be of questionable clinical significance. Minor discopathic pain generators were hypothesized at L3-4 and L4-5 but again were noted to be of questionable clinical significance.

Dr. Jackson opined that appellant had had a disc injury for nine years and therefore would not benefit from further intervention, but remained totally disabled. However, he did not explain the basis for this conclusion, or how the disc injury was related to appellant's accepted condition of chronic low back soft tissue muscular strain injury. Therefore, his report and opinion are not rationalized and are of diminished probative value, such that they are insufficient to establish appellant's recurrence claim.

Thereafter the Office sought a second opinion as to appellant's recurrence claim. Dr. Rosenthal was chosen for a second opinion examination and evaluation, and he provided a limited report identifying her chronic pain and recommending epidural or facet blocks or injections. He did not, however, provide answers to the Office's questions.

As the opinion Dr. Rosenthal expressed in the requested clarification failed to address the issues raised by the Board and, subsequently, by the Office, the Office was required to schedule another second opinion specialist's examination. Dr. Danziger was ultimately chosen.

Dr. Danziger noted upon physical examination of appellant that she had minimal objective findings, no spasm or other low back symptoms, no neurological abnormalities and minimal hamstring tightness, and that upon diagnostic radiological evaluation she had minimal evidence of disc disease, mild disc bulges only, and little canal stenosis without foraminal narrowing of either L5-S1 nerve root. He also opined that appellant was well outside the realm of normal healing of soft tissue injuries, and found significant symptom magnification and subjective complaints without objective causes evident. Based upon a lack of objective symptomatology and discograms of minimal clinical significance, he determined that appellant did not continue to suffer from any significant medical condition other than expected mild degenerative disc aging. Dr. Danziger provided a thorough and well-rationalized report and supplement which answered the Office's questions and which noted that appellant's MRI scan was compatible with those of other people in her age group, and that her EMG study was normal.

He opined that her symptomatology was based solely on preexisting degenerative disc disease and was unrelated to any 1992 accident or incident. Dr. Danziger also explained that, regarding aggravation of appellant's preexisting low back conditions in 1992, there was absolutely no evidence that the limited duty she was performing, four hours per day and a 10-pound lifting limit, during the implicated period in 1992 provided any additional aggravation or exacerbation of her preexisting low back conditions. He concluded that appellant's symptomatology was entirely related to her preexisting degenerative low back disease rather than to a 1992 aggravation or exacerbation.

Appellant presented no other rationalized medical reports supporting her contentions, and she failed to provide evidence under the *Hedman* standard that supported a recurrence of disability, causally related to factors of her employment in 1992. She merely claimed that Dr. Rosenthal supported her 1992 injury claim and found her totally disabled. The Board, however, notes that Dr. Rosenthal provided only a noncontemporaneous orthopedic report which stated that appellant's current symptoms were similar to those in April and August 1992, based upon her contentions, and which speculated that she would probably remain totally disabled. This report is couched in speculative terms and is therefore not of great probative value. Further, no objective evidence of disability is identified, apart from appellant's complaints and claims of pain.

As Dr. Danziger's second opinion report and its supplements are rationalized and based upon objective evaluation and findings, they constitute the weight of the medical evidence and establish that appellant had no recurrence of disability commencing either on May 15, 1992 or on August 17, 1992, causally related either to any change in her work duties performed during the period April 12 through August 17, 1992, or to any change in the nature and extent of her injury-related condition.

CONCLUSION

Appellant has failed to meet her burden of proving that she sustained an aggravation of a preexisting low back condition causing disability commencing May 15 or August 17, 1992, causally related to the work duties performed during the period between April 12 and August 17, 1992. The weight of the medical evidence remains with Dr. Danziger, who provided a well-rationalized report and clarification which concluded that appellant had degenerative disc disease at a level commensurate with her age group, and had no continuing disability for employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2003 be affirmed.

Issued: October 25, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member